In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 342

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE PROCTER & GAMBLE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

We deem it appropriate to reply briefly to two points raised by Procter in its brief.

1. In response to our argument that the merger strengthens Clorox's already dominant position in the liquid bleach industry by conferring upon it substantial new advantages in advertising and promotion, Procter answers that the record shows the alleged advantages to be "either entirely imaginary or improbable" (Br. 33). We note, however, that to support this claim as to what the *record* demonstrates Procter relies heavily upon certain testimony before

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the Senate Antitrust and Monopoly Subcommittee[1] that was given more than nine years after the merger, more than four years after the record in the Commission proceeding was closed, and indeed some of it two weeks after the government's brief was filed in this case. If the validity of administrative orders is to be determined upon the basis of evidence that was not even in existence when the agency rendered its decision, it is plain that administrative proceedings would never become final. Just this Term this Court firmly rejected such a contention, declining to consider evidence of "present conditions" in a case, like this, already 10 years old. *Illinois C.R. Co.* v. *Norfolk & W.R. Co.*, 385 U.S. 57, 75.

In addition, we point out that Procter has offered a highly tendentious and misleading presentation of the evidence developed before the Subcommittee—quoting only the self-serving declarations by the network executives and ignoring some five volumes of testimony that indicate forcefully that the advantages of the large, multi-product advertiser—like Procter—are even greater than the Commission thought when it decided this case.

Procter lays heavy stress on testimony to the effect that the discount schedules in the network rate cards have been abolished. In context, it becomes evident that the change in the rate cards has little significance with respect to the continued prevalence of discrimi-

[1] Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, on Possible Discriminations in TV Advertising, 89th Cong., 2d Sess. (1966).

nation in favor of large advertisers. Testimony of a network executive [2] indicates that network television sponsorship is sold to advertisers in basically three ways. First, under the "time-only" form of sponsorship the advertiser contracts with a network for a half-hour or an hour of time and supplies its own program. As late as the last quarter of 1959, 45 percent of the evening schedule on CBS was sold in this manner. At the present time less than 6 percent of CBS evening programming is advertiser supplied. The second form of sponsorship is the so called "conventional sponsorship," in which the advertiser usually contracts for a half-hour or more of network time and also pays the network a program price for the right to sponsor the program. The basic difference between "conventional" and "time-only" purchases is apparently that in the former the advertiser buys the program from the network, in the latter from an independent programmer. Again, in the last quarter of 1959, 50.4 percent of the CBS evening schedule was sold on this basis. At the present time 26 percent of the CBS evening schedule is so sold. The third type of sponsorship is "participating minutes." On this kind of sale the advertiser pays a single price, covering both time and program charges, for a minute on a particular program. In 1959 only 4.9 percent of the CBS evening schedule was sold as participating minutes; today this type of sale ac-

[2] Except as otherwise indicated, this account of recent trends in network advertising is taken from the testimony of Mr. Thomas H. Dawson, Senior Vice President of CBS Television, in Hearings on Possible Discriminations, *supra*, pp. 542, 543–546.

counts for approximately 65 percent of the CBS evening schedule.

The network rate cards, partially relied upon by the Commission in making its determination that large advertisers enjoyed significant advantages,[3] applied to both time-only and conventional sponsorship, but not to the sale of participating minutes. Thus, in 1959 there was a published discount schedule that gave large advertisers significant advantages on purchases of advertising time—which then constituted 95 percent of the CBS evening schedule. Today, the rate card applies to only 32 percent of the CBS evening schedule, 6 percent of ABC sales (Hearings, *supra,* p. 54–A), and only a "small minority" of NBC sales (*id.,* p. 684). If the trend of the past seven years continues, the volume of sales affected by the rate cards will diminish even further. For this reason, it is of little significance that the networks will soon abandon publication of their discount schedules. The fact remains that all advertising sales (time only, conventional sponsorship, and participating minutes) are subject to negotiation. The prices at which these sales are made are not available to any government agency, much less the public, and thus the opportunity for undetected discrimination remains.[4] Yet, although such discrimination is difficult

[3] We stress that the discounts specified in these cards represent but one of many factors relied on by the Commission in concluding that the merger enhanced Clorox's power to dominate the liquid bleach industry.

[4] Testifying before the Subcommittee, the Chairman of the Federal Trade Commission, Paul Rand Dixon, had these observations on the announcement by the networks that they were

to detect, the record before the Subcommittee contains extensive evidence that it continues and is substantial.[5]

2. Procter argues (Br. 26) that the government, in contending that the merger eliminated substantial po-

eliminating their published discount schedules (p. 477): "Mere announcements by the networks may or may not remove the problem of alleged discrimininination and even an actual change in a published rate card does not necessarily mean that substantial and anticompetitive discounts have been removed, assuming they previously have existed. Our experience in the field of discounts and price discrimination shows that most grants of discriminatory prices are not, as a rule, openly published, and that the removal of published discounts may only signal a shift in pattern—toward negotiations which utilize the published rates only as a starting point."

[5] See, *e.g.*, Hearings on Possible Discriminations, *supra*, pp. 16–17, 18, 20–21, 25, 56; 87–90 (a small advertiser "was all but escorted" out of CBS offices); 92 (no prime time available for small advertisers); 93, 109, 134–135, 203–209, 214, 242–243, 247, 248; 268 ("Networks and stations today still grant unpublished concessions"); 273 (large advertisers have a right of first refusal on better programs); 284–289, 294, 295, 309–311, 321, 330–331, 336, 337–338, 340, 359, 371, 381, 437.

With regard to the Justice Department's statement in the hearings (relied upon by Procter (Br. 39–40)), Procter's representations are inaccurate. Mr. Zimmerman expressly stated that he would direct his comments to only two subjects (Hearings, p. 716): First, the general relationship between advertising discounts and competition, and, secondly, an enumeration of the types of discrimination which the testimony of prior witnesses indicated might exist. Mr. Zimmerman's testimony on the factual issue whether there was in fact discrimination, was addressed solely to the record before the committee. At the time his testimony was prepared the networks had not yet testified. Because the record was incomplete the Department took no position on this issue.

tential competition, has misapplied the test of *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158. So saying, Procter misconceives the fundamental theory of the Commission in the present case. In *Penn-Olin,* a joint-venture case, the Court suggested standards for determining the likelihood that at least one of the joint venturers would have entered the market on its own but for the joint venture. The probability of such entry in fact was critical because, if neither party to the joint venture would have entered independently, it would follow that the joint venture produced a net increase in the number of competitors in the relevant market. Here the question is quite different. It is not whether Procter in fact would have entered the bleach industry on its own, but for the merger; it is whether Procter's ability and willingness to enter—if Clorox made entry attractive by exploiting its dominant position—were such as to impose a restraining influence upon such exploitation during the period while Procter merely waited in the wings prepared to enter when conditions ripened. This salutary influence—which the Commission correctly deemed substantial in the circumstances—was eliminated by the merger. And the merger, of course, unlike a joint venture, did not introduce a new competitor into the

relevant market but merely substituted Procter for Clorox as the dominant firm.[6]

Respectfully submitted.

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JANUARY 1967.

[6] We erred in stating in our opening brief (p. 43) that since the merger Procter has included Clorox bleach in joint promotions with other Procter products. We stress, however, that Clorox now has the opportunity to participate in the savings afforded by joint promotions—and that these savings exceed postage expenses (substantial as such expenses are in large-scale promotional campaigns). Among the substantial costs that can be divided among many products in joint promotions are, for example, the costs of a contest (which in one case were more than $100,000 in prizes alone) and the cost of television and newspaper advertising to publicize the promotion (CX 111A–I, R. 117x–125x; CX 279A–O, R. 137x–142x; CX 420, R. 171x).

U.S. GOVERNMENT PRINTING OFFICE: 1967